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Provisional application of treaties

Memorandum by the Secretariat

Summary

Article 25 of the Vienna Convention on the Law of Treaties provides for the possibility of the application of treaties on a provisional basis. Its origins lie in proposals for a provision recognizing the practice of the "provisional entry into force" of treaties, made by Special Rapporteurs Gerald Fitzmaurice and Humphrey Waldock during the consideration by the International Law Commission of the law of treaties. The provision, which was included in the 1966 articles on the law of treaties as article 22, was amended at the Vienna Conference on the Law of Treaties by, inter alia, substituting the concept of provisional "application" for "entry into force". The present memorandum traces the negotiating history of the provision both in the Commission and at the Vienna Conference, and provides a brief analysis of some of the substantive issues raised during its consideration.

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I. Introduction

1. At its sixty-fourth session, held in 2012, the International Law Commission included the topic "provisional application of treaties" in its programme of work. At that session, the Commission decided to request from the Secretariat a memorandum on the previous work undertaken by the Commission on the subject in the context of its work on the law of treaties, and on the *travaux préparatoires* of the relevant provisions of the 1969 Convention on the Law of Treaties.[1]

2. The present memorandum provides, in section II below, a description of the procedural history of the consideration by the International Law Commission of what it called the "provisional entry into force" of treaties, as well as of the negotiation, at the 1968-69 Vienna Conference on the Law of Treaties, of article 25 of the 1969 Vienna Convention on the Law of Treaties:[2]

> Provisional application
>
> 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
>
> (a) the treaty itself so provides; or
>
> (b) the negotiating States have in some other manner so agreed.
>
> 2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

3. Section III below contains a description of some of the substantive issues raised during the discussions in the Commission, as well as during the negotiations at the Vienna Conference.

II. Procedural history

4. The topic "law of treaties" was among those selected by the International Law Commission in 1949 for codification, and was subsequently considered by the Commission at its second to eighteenth sessions, from 1950 to 1966, during which time four successive Special Rapporteurs were appointed.[3] Following an initial consideration of the topic, on the basis of Special Rapporteur James L. Brierly's first and second reports,[4] submitted in 1950 and 1951, respectively, the Commission next held a substantive discussion of the topic in 1959, on the basis of the first report of Gerald Fitzmaurice,[5]

[1] A/67/10, para. 143.

[2] United Nations, *Treaty Series*, vol. 1155, p. 331.

[3] James L. Brierly (in 1949), Hersch Lauterpacht (in 1952), Gerald Fitzmaurice (in 1955) and Humphrey Waldock (in 1961).

[4] A/CN.4/23 and A/CN.4/43, respectively.

[5] A/CN.4/101.

which he had submitted in 1956.[6] The Commission took a further hiatus from the topic in order to concentrate its efforts on other topics, and returned to its consideration of the law of treaties at its fourteenth to eighteenth sessions, from 1962 to 1966, which it undertook on the basis of six reports submitted by Humphrey Waldock,[7] who had since been appointed to replace Mr. Fitzmaurice as Special Rapporteur for the topic. It was on the basis of Mr. Waldock's reports that the Commission completed the first (in 1964) and second (in 1966) readings of the draft articles on the law of treaties,[8] which it adopted in 1966.

5. The 1966 draft articles on the law of treaties included draft article 22, entitled "Entry into force provisionally", which read as follows:

> 1. A treaty may enter into force provisionally if:
>
> (a) The treaty itself prescribes that it shall enter into force provisionally pending ratification, acceptance, approval or accession by the contracting States; or
>
> (b) The negotiating States have in some other manner so agreed.
>
> 2. The same rule applies to the entry into force provisionally of part of a treaty.

A. International Law Commission, 1950 to 1966

1. Consideration at the second to sixth sessions, 1950 to 1954

6. Mr. Brierly and Hersch Lauterpacht dealt only with the question of the "provisional entry into force" of a treaty, indirectly (in the case of the former) or as part of the broader question of ratification (in that of the latter). In his proposal for an article 5 (entitled "When ratification is necessary"), submitted in 1951, Mr. Brierly envisaged several scenarios in which a State would not be deemed to have undertaken a final obligation under the treaty until it ratified that treaty.[9] The provision was subsequently recast to deal with the legal effect of signature prior to ratification and was adopted that year, on a preliminary basis, as article 4, which envisaged the possibility of a State being deemed to have undertaken a final

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[6] While the Commission did not consider Mr. Brierly's third report (A/CN.4/54 and Corr.1) or the two reports presented by Hersch Lauterpacht (A/CN.4/63 and A/CN.4/87 and Corr.1, respectively), owing to a lack of time and to postponement following the resignation of both Rapporteurs, both Gerald Fitzmaurice and Humphrey Waldock drew on the reports of their predecessors when developing their own proposals, and the positions taken by both Mr. Brierly and Mr. Lauterpacht were referred to on numerous occasions during the discussions within the Commission in later years. Likewise, owing to lack of time, the Commission was unable to consider Mr. Fitzmaurice's second to fifth reports, submitted in 1957 to 1960 (A/CN.4/107, A/CN.4/115 and Corr.1, A/CN.4/120 and A/CN.4/130), respectively. Nonetheless, those reports were referred to extensively by Mr. Waldock.

[7] A/CN.4/144 and Add.1, A/CN.4/156 and Add.1-3, A/CN.4/167 and Add.1-3, A/CN.4/177 and Add.1 and 2, A/CN.4/183 and Add.1-4, and A/CN.4/186 and Add.1-7, respectively.

[8] *Yearbook of the International Law Commission*, 1966, vol. II, p. 177.

[9] See A/CN.4/43.

obligation by its signature of a treaty "if the treaty provides that it shall be ratified but that it shall come into force before ratification".[10]

7. An early direct reference to the provisional entry into force of a treaty was made by J. P. A. François, in 1951, when he called on the Commission

> to consider the imaginary case of a treaty between two States which had been signed and ratified by both parties. The Heads of State had exchanged the instruments of ratification. Provisionally the treaty was in force.[11]

8. In his first report, submitted in 1953, Mr. Lauterpacht, in his proposal for article 6, on ratification, anticipated the possibility of a treaty expressly providing for entry into force prior to ratification.[12]

2. Consideration at the eighth to twelfth sessions, 1956 to 1960

9. Although Mr. Fitzmaurice submitted five reports, the Commission was able to consider only parts of his first report (in 1959), in which he proposed a set of 42 draft articles, focusing primarily on the framing, conclusion and entry into force of treaties.

10. The Special Rapporteur's proposal for article 42 (Entry into force (legal effects)), indicated, in its paragraph 1:

> A treaty may ... provide that it shall come into force provisionally on a certain date, or upon the happening of a certain event, such as the deposit of a specified number of ratifications. In such cases an obligation to execute the treaty on a provisional basis will arise, but, subject to any special agreement to the contrary, will come to an end if final entry into force is unreasonably delayed or clearly ceases to be probable.[13]

The commentary to the provision simply stated that it covered the case of provisional entry into force and stated the rule applicable in case this situation became unduly prolonged.[14]

11. While the proposal was never discussed by the Commission, passing references to the possibility of the provisional entry into force of a treaty were made during the debate held in 1959. For example, in the context of the discussion on the general conditions for the obligatory force of treaties, Milan Bartoš suggested that some consideration should be given to the growing practice, particularly in commercial agreements, of inserting a clause concerning the provisional entry into force of an agreement pending ratification[15] and that there were valid practical

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[10] See A/CN.4/L.28. A revised version of the provision, with commentary thereto, was subsequently included (as article 6) in Mr. Brierly's third report, submitted in 1952, which reproduced the articles tentatively adopted by the Commission at its second and third sessions, in 1950 and 1951. However, owing to the resignation of the Special Rapporteur, the Commission never debated that report.

[11] A/CN.4/SR.88, para. 37.

[12] A/CN.4/63, article 6 (2) (b) ("2. In the absence of ratification a treaty is not binding upon a Contracting Party unless:

...

"(b) The treaty, while providing that it shall be ratified, provides also that it shall come into force prior to ratification").

[13] See A/CN.4/101.

[14] Ibid., para. 106.

[15] A/CN.4/SR.487, para. 37.

considerations for the inclusion of a clause concerning the provisional entry into force of treaties.[16]

3. Consideration at the fourteenth session, 1962

12. The provisional entry into force of treaties was dealt with by Mr. Waldock in his first report,[17] which was considered in 1962. The concept was introduced in paragraph 6 of his proposal for article 20 (Mode and date of entry into force):

> a treaty may prescribe that it shall come into force provisionally on signature or on a specified date or event, pending its full entry into force in accordance with the rules laid down in this article.[18]

13. The Special Rapporteur explained that paragraph 6 sought to cover what in modern practice was a not infrequent phenomenon — a treaty brought into force provisionally, pending its full entry into force when the required ratifications or acceptances had taken place.[19] He noted that a treaty clause having this effect was, from one aspect, a clause relating to a mode of bringing a treaty into force.[20] The Commission focused on other aspects of article 20,[21] with only passing reference made to paragraph 6.

14. Mr. Waldock's proposal for article 21, dealing with the legal effects of the entry into force of a treaty, also included the following reference to the effects of provisional entry into force:

> 2. (a) When a treaty lays down that it shall come into full force provisionally upon a certain date or event, the rights and obligations contained in the treaty shall come into operation for the parties to it upon that date or event and shall continue in operation upon a provisional basis until the treaty enters into full force in accordance with its terms.
>
> (b) If, however, the entry into full force of the treaty is unreasonably delayed and, unless the parties have concluded a further agreement to continue the treaty in force on a provisional basis, any of the parties may give notice of the termination of the provisional application of the treaty; and when a period of six months shall have elapsed, the rights and obligations contained in the treaty shall cease to apply with respect to that party.[22]

15. The discussion on paragraph 2 focused on subparagraph (b), which the Special Rapporteur had proposed *de lege ferenda*. After several doubts had been expressed regarding the advisability of including the provision,[23] the Special Rapporteur withdrew it and the Commission referred subparagraph (a) to the Drafting Committee.[24] The Commission had earlier accepted a procedural proposal by the Special Rapporteur that article 20, paragraph 6, be considered by the Drafting

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[16] Ibid., para. 40.
[17] A/CN.4/144 and Add.1.
[18] Ibid.
[19] Ibid., para. (7) of the commentary to article 20.
[20] Ibid.
[21] See A/CN.4/SR.656 and 657.
[22] See A/CN.4/144 and Add.1.
[23] See the discussion on the termination of the provisional application of treaties in paras. 85 to 108 of the present memorandum.
[24] A/CN.4/SR.657, paras. 12-18.

Committee together with article 21, paragraph 2, with a view to being included in an article 19 bis, which would contain all the provisions on the rights and obligations of States prior to the entry into force of the treaty.[25]

16. The Drafting Committee, however, adopted a narrower article 19 bis (renumbered as article 17) limited to the general obligation of good faith prior to the entry into force of a treaty. In introducing that article, the Special Rapporteur recalled that, in the course of the discussion of various articles, it had been suggested that particular points should be transferred to article 19 bis. One of those points was the question of provisional entry into force. The Drafting Committee had decided, however, that that question should be dealt with in the articles concerning entry into force.[26]

17. The Drafting Committee's subsequent proposal for a revised article 20 (entitled "Entry into force of treaties") no longer included a reference to provisional entry into force.[27] The issue was, instead, entirely subsumed in its proposal for a revised article 21 (entitled "Provisional entry into force"), which read as follows:

> A treaty may prescribe that, pending its entry into force by the exchange or deposit of instruments of ratification, accession, acceptance or approval, it shall come into force provisionally, in whole or in part on a given date or on the fulfilment of specified requirements. In that case the treaty shall come into force as prescribed and shall continue in force on a provisional basis until either the treaty shall have entered into force definitively or the States concerned shall have agreed to terminate the provisional application of the treaty.[28]

The Commission adopted the article, on first reading, in the form proposed, as (renumbered) article 24.

18. "Provisional entry into force" was also referred to during the consideration of other articles that year. Several members discussed the provisional entry into force of treaties in the context of article 9 (Legal effects of a full signature), in particular the reference in paragraph 2, subparagraph (c), to the obligation of good faith on the part of a signatory State, and paragraph 2, subparagraph (d), concerning the right of the signatory State to insist on the performance of other signatories.[29] Reference was also made in the commentary to article 12 (Ratification), as adopted in 1962, in which it was noted, "It may not be very often that a treaty expressed to come into force upon signature is made subject to ratification; but this does sometimes happen in practice when a treaty which is subject to ratification is expressed to come into force provisionally upon signature."[30]

4. Consideration at the fifteenth and sixteenth session, 1963 and 1964

19. Mr. Waldock's second and third reports did not revisit the concept of the "provisional entry into force of treaties" directly. Nonetheless, his second report dealt with, inter alia, the question of constitutional limitations on the validity of

[25] Ibid., para. 3.
[26] A/CN.4/SR.661, para. 2.
[27] A/CN.4/SR.668, para. 34.
[28] Ibid., para. 37.
[29] A/CN.4/SR.643, paras. 86-87, and A/CN.4/SR.644, paras. 69 and 87.
[30] *Yearbook of the International Law Commission, 1962*, vol. II, p. 173, para. (8) of the commentary to article 12.

treaties, including those not yet in force.[31] The report also considered the question of the termination of a treaty, which would ex hypothesi also terminate the provisional entry into force of the treaty.

20. A passing reference was made in the third report, in which, in the discussion on article 57 (Application of treaty provisions *ratione temporis*), it was indicated, inter alia, that the rights and obligations created by a treaty could not come into force until the treaty itself was in force, either definitively or provisionally under article 24.[32]

5. Consideration at the seventeenth session (first part), 1965

21. Article 24 was considered again in 1965, in the context of the second reading of the articles on the law of treaties. The Commission had before it Mr. Waldock's fourth report,[33] which contained an analysis of comments and observations received from Governments, together with his suggestions for amendments. Japan noted that the technique of provisional entry into force was in fact sometimes resorted to as a practical measure, but the precise legal nature of such provisional entry into force did not seem to be very clear unless its legal effect could be precisely defined, it seemed best to leave the matter entirely to the intention of the contracting parties. Provisions of article 23, paragraph 1, could perhaps cover this eventuality.[34] Such sentiments were echoed by the United States of America, which took the view that while the article accorded with present-day requirements and practices, it might be questioned whether such a provision in a convention on treaties was necessary.[35] Sweden, and later the Netherlands, commented on substantive aspects of the provision.[36]

22. In response, the Special Rapporteur recalled that the Commission had considered that "provisional entry into force" occurred in modern treaty practice with sufficient frequency to require notice in the draft articles, and it seemed desirable for the legal character of that situation to be recognized in the draft articles, lest the omission be interpreted as denying it.[37] He added that leaving the matter to the application of the general rule in article 23, paragraph 1 (on entry into force of a treaty), would not cover the problem altogether, as the States concerned sometimes brought about the "provisional entry into force" by a separate agreement in simplified form."[38]

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[31] See A/CN.4/156 and Add.1-3, proposal for article 5 (Constitutional limitations on the treaty-making power).

[32] A/CN.4/167 and Add.1-3, para. (2) of the commentary to article 57.

[33] A/CN.4/177 and Add.1 and 2.

[34] See A/CN.4/182 and Corr.1 and 2 and Add.1-3.

[35] Ibid.

[36] Ibid. References to the provisional entry into force of treaties were also made in the comments by Luxembourg on article 12 (Ratification) and by Cyprus and Israel in relation to the applicability of article 55 (*Pacta sunt servanda*) (ibid.).

[37] A/CN.4/177 and Add.1, article 24, observation of the Special Rapporteur, para. 1.

[38] Ibid.

23. The second-reading debate on article 24[39] was held on the basis of a revised version proposed by the Special Rapporteur.[40] While different opinions were expressed, in particular as to how the question of the termination of the provisional entry into force was dealt with, the Commission decided to retain a distinct provision in the draft articles.[41] The Commission also debated a proposal by Paul Reuter to refer to the provisional "application" of a treaty, as opposed to its provisional "entry into force".[42]

24. On 2 July 1965, the Commission adopted, by a vote of 17 to none, article 24, as follows:[43]

> 1. A treaty may enter into force provisionally if:
>
> (a) The treaty itself prescribes that it shall enter into force provisionally pending ratification, accession, acceptance or approval by the contracting States; or
>
> (b) The contracting States have in some other manner so agreed.
>
> 2. The same rule applies to the entry into force provisionally of part of a treaty.

6. Consideration at the eighteenth session, 1966

25. Article 24 was next referred to the following year, in Mr. Waldock's sixth report,[44] in the context of its relationship with articles 55 (*Pacta sunt servanda*)[45] and 56 (Application of a treaty in point of time), primarily in response to a set of comments received from the Government of Israel.

26. The Commission returned to the consideration of article 24 during the adoption of the final draft articles on the law of treaties. While a suggestion by Shabtai Rosenne to reverse the order of articles 23 and 24[46] was not adopted, the

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[39] Provisional entry into force was also referred to in the debate on other articles. In connection with article 12, see the statements of Abdullah El-Erian (A/CN.4/SR.784, para. 86), Antonio de Luna (A/CN.4/SR.785, para. 69) and Roberto Ago (ibid., para. 81). The practice was also referred to by Paul Reuter, in the context of article 17, concerning the rights and obligations of States prior to the entry into force of the treaty (A/CN.4/SR.788, para. 36).

[40] The proposal for a revised text was as follows: "A treaty may prescribe, or the parties may otherwise agree that, pending its entry into force by the exchange or deposit of instruments of ratification, accession, acceptance or approval, it shall come into force provisionally, in whole or in part, on a given date or on the fulfilment of specified requirements. In that case the treaty or the specified part shall come into force as prescribed or agreed, and shall continue in force on a provisional basis until either the treaty shall have entered into force definitively or it shall have become clear that one of the parties will not ratify or, as the case may be, approve it" (A/CN.4/SR.790, para. 73).

[41] However, Taslim Olawale Elias opposed the retention of article 24, since the issue appeared to be covered by paragraphs 1 and 3 of article 23 (ibid., para. 84). See also the views of Senjin Tsuruoka (A/CN.4/SR.791, paras. 9-10, 12 and 26). While José Maria Ruda expressed his sympathy for such views, he nonetheless supported the retention of the article for practical reasons (A/CN.4/SR.790, para. 85).

[42] A/CN.4/SR.790, para. 75. See the discussion in paras. 48 and 49 of the present memorandum.

[43] An earlier version proposed by the Drafting Committee was sent back (A/CN.4/SR.814, paras. 38-56).

[44] A/CN.4/186 and Add.1-7.

[45] See the discussion in paras. 75 and 76 of the present memorandum.

[46] A/CN.4/SR.886, para. 63.

Commission accepted the Drafting Committee's proposal that the words "negotiating States" be substituted for the words "contracting States" in paragraph 1, subparagraph (b).[47] With that final amendment, article 24 (subsequently renumbered as article 22) was adopted, on second reading. The Commission also adopted a commentary containing four paragraphs, dealing with the two recognized bases for provisional entry into force (i.e., in accordance with the terms of a provision in the treaty itself or on the basis of a separate agreement), the practice of bringing into force provisionally only a certain part of a treaty, and an explanation of the decision to exclude reference to the termination of provisional entry into force.[48]

B. General Assembly, 1966 and 1967

27. Upon receiving the report of the International Law Commission, the General Assembly, at its twenty-first session, in 1966, decided, in its resolution 2166 (XXI), to invite the submission of written comments and observations on the draft articles. Of those member Governments submitting such comments and observations, only Belgium commented on article 22 (focusing on the mode of termination of provisional entry into force).[49] At the twenty-second session of the Assembly, in 1967, during the debate on the law of treaties, the delegation of Sweden referred, with approval, to the Belgian comment.[50]

C. Vienna Conference on the Law of Treaties, 1968 and 1969

28. The United Nations Conference on the Law of Treaties was held in Vienna, in two sessions, from 26 March to 24 May 1968 and from 9 April to 22 May 1969, respectively.

1. Consideration at the first session, 1968

29. Draft article 22 was first considered by the Committee of the Whole of the Conference,[51] which had before it 10 proposals for amendments.[52] A proposal to delete the article was not pressed by the sponsors.[53] A number of drafting proposals were referred to the Drafting Committee. Two proposals to delete paragraph 2 were rejected.[54] A proposal to refer to the provisional "application", as opposed to the "entry into force", of treaties was adopted.[55] The Committee of the Whole

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[47] A/CN.4/SR.887, para. 69.

[48] *Yearbook of the International Law Commission, 1966*, vol. II, p. 210. See also para. (3) of the commentary to article 23 (*Pacta sunt servanda*), previously article 55 ("The words 'in force' of course cover treaties in force provisionally under article 22", p. 211).

[49] A/6827 and Corr.1, p. 6. See also, para. 95 of the present memorandum.

[50] *Official Records of the General Assembly, Twenty-second Session*, Sixth Committee (Legal Questions), 980th meeting, para. 13.

[51] At its 26th and 27th meetings, held in April 1968 (see *Official Records of the United Nations Conference on the Law of Treaties*, vol. I, pp. 140-146).

[52] Ibid., vol. III, Report of the Committee of the Whole, paras. 222-230.

[53] Proposal by the Republic of Korea, the Republic of Viet Nam and the United States of America (see A/CONF.39/C.1/L.154 and Add.1).

[54] By 63 votes to 11, with 12 abstentions (see *Official Records of the United Nations Conference on the Law of Treaties*, vol. III, Report of the Committee of the Whole, para. 227 (a)).

[55] By 72 votes to 3, with 11 abstentions (ibid., para. 227 (b)).

approved, in principle, two proposals to include a new paragraph, on the termination of the provisional entry into force or provisional application of a treaty.[56]

30. With the aforementioned understanding and decisions, the article was referred to the Drafting Committee, which subsequently proposed the following revised text for article 22:[57]

> 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
>
> (a) the treaty itself so provides; or
>
> (b) the negotiating States have in some other manner so agreed.
>
> 2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

31. In introducing the revised text, the Chair of the Drafting Committee pointed out that the article reflected a modified version of the proposal by Czechoslovakia and Yugoslavia for the chapeau to paragraph 1, including the reference to the "provisional application" of treaties. The concept of the provisional application of part of a treaty, previously set out in paragraph 2, had been incorporated into paragraph 1. New paragraph 2 reintroduced the issue of the termination of the provisional application of a treaty. All other proposals were rejected by the Drafting Committee. The Committee of the Whole adopted article 22, as proposed by the Drafting Committee, without a vote.[58]

2. Consideration at the second session, 1969

32. The report of the Committee of the Whole on draft article 22 was taken up in the plenary of the Conference at the second session. The Conference adopted article 22 by 87 votes to 1, with 13 abstentions.[59] Article 22 was renumbered as article 25 of the Convention on the Law of Treaties.

III. Substantive issues discussed during the development of article 25

A. Raison d'être of provisional application of treaties

33. As early as in 1953, when Mr. Lauterpacht referred to the existence of a treaty which, "while providing that it shall be ratified, provides also that it shall come into force prior to ratification",[60] a common theme in the reports of the Special

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[56] By 69 votes to 1, with 20 abstentions (ibid. para. 227 (c)).

[57] Ibid., vol. I, 72nd meeting of the Committee of the Whole, p. 426.

[58] Ibid., p. 427.

[59] Ibid., vol. II, 11th plenary meeting, para. 101. The Drafting Committee subsequently rejected several proposals to modify article 22, raised during the debate immediately prior to its adoption, as well as a proposal by Yugoslavia to include a new article (see para. 79 of the present memorandum). Ibid., 28th plenary meeting, paras. 45-47.

[60] A/CN.4/63, article 6 (2) (b).

Rapporteurs and in the debate in the Commission was the extent to which this phenomenon was common in the practice of States. Mr. Lauterpacht noted that there were frequent examples of this type of treaty.[61]

34. During the debate on the first report by Mr. Fitzmaurice,[62] held in 1959, Mr. Bartoš suggested that some consideration should be given to the growing practice, particularly in commercial agreements, of inserting a clause concerning the provisional entry into force of an agreement pending ratification.[63] He reiterated the suggestion in 1962, when he referred to the recent growth of a practice, particularly in the case of customs agreements, whereby they entered into force at once pending definitive ratification.[64]

35. In the commentary to his proposal for article 20, paragraph 6, Mr. Waldock alluded to a modern practice which was a not infrequent phenomenon: a treaty brought into force provisionally, pending its full entry into force.[65] The commentary to (renumbered) article 24, adopted by the Commission in 1962, stated: "This article recognizes a practice which occurs with some frequency today and requires notice in the draft articles".[66]

36. In 1965, Grigory Tunkin considered article 24 to be descriptive of an existing practice rather than expressive of a rule of law. His own experience showed that it was not uncommon for a bilateral treaty to be subject to ratification but to enter into force immediately upon signature.[67] The Special Rapporteur subsequently noted that the Commission as a whole appeared to be firmly of the opinion that it was dealing with a common phenomenon which had become an ordinary part of existing treaty practice.[68]

37. These views were echoed at the Vienna Conference.[69] Venezuela expressed the view that entry into force provisionally corresponded to a widespread practice and that provisional application met real needs in international relations.[70] A number of

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[61] Ibid., para. 5 (b) of the comment to article 6 (2) (b). Specific examples were cited in the statements by Mr. Briggs in 1962 (A/CN.4/SR.644, para. 87), Mr. El-Erian in 1965 (A/CN.4/SR.790, para. 98), Mr. Bartoš in 1965 (A/CN.4/SR.791, para. 23) and Mr. Pessou in 1965 (A/CN.4/SR.791, para. 31), as well as in the statement by Venezuela at the first session of the Vienna Conference in 1968 (see *Official Records of the United Nations Conference on the Law of Treaties*, vol. I, 26th meeting of the Committee of the Whole, para. 29).

[62] See A/CN.4/101. In his commentary to article 42 (1), the Special Rapporteur simply noted, "This covers the case of provisional entry into force" (para. 106).

[63] A/CN.4/SR.487, para. 37.

[64] A/CN.4/SR.643, para. 86. See also A/CN.4/SR.647, para. 97.

[65] A/CN.4/144 and Add.1, para. (7) of the commentary to article 20.

[66] *Yearbook of the International Law Commission, 1962*, vol. II, p. 182, para. (1) of the commentary to article 24.

[67] A/CN.4/SR.791, para. 28.

[68] Ibid., para. 55.

[69] See also the view expressed by Mr. Waldock, in his capacity as Expert Consultant to the Vienna Conference, that the practice of provisional application was now well established among a large number of States. See *Official Records of the United Nations Conference on the Law of Treaties*, vol. II, 11th plenary meeting, para. 89.

[70] Ibid., vol. I, 26th meeting of the Committee of the Whole, paras. 29 and 31. However, see also the view of Bulgaria that article 22 involved a situation which seldom arose (ibid., para. 59).

delegations opposed a proposal to delete the article on the grounds that it reflected existing practice.[71]

38. The need to expedite the application of a treaty, typically as a matter of urgency, was the common justification offered for the practice. In 1959, Mr. Bartoš referred to the valid practical considerations for the inclusion of a clause,[72] and Georges Scelle was prepared to admit it in some very exceptional cases, e.g., customs agreements intended essentially for the immediate protection of a country's economy.[73] The commentary to article 24, adopted in 1962, stated: "Owing to the urgency of the matters dealt with in the treaty or for other reasons the States concerned may provide in a treaty, which it is necessary for them to bring before their constitutional authorities for ratification or approval, that it shall come into force provisionally".[74] Abdullah El-Erian, in 1965, shared this understanding when he stated that the inclusion of a clause on provisional entry into force in a treaty served a useful purpose where the subject matter was urgent, the immediate implementation of the treaty was of great political significance, or it was psychologically important not to wait for completion of the lengthy process of compliance with constitutional requirements.[75]

39. At the Vienna Conference, Venezuela noted that the practice was based on the urgency of certain agreements.[76] Romania stated that the practice of applying treaties provisionally arose in cases where immediate application was necessitated by the urgency of the content of the treaty.[77] Malaysia observed that the advantages of the treaty could be obtained much sooner.[78] Austria noted that the closely knit structure of international relations might require the immediate application of a treaty.[79] Costa Rica was of the view that the practice should be commended on grounds of flexibility.[80] Italy noted that the purpose of article 22 was, inter alia, to provide the necessary element of flexibility to regulate present international treaties.[81] Similarly, the Expert Consultant (Mr. Waldock) recalled that provisional application was typically resorted to in two situations: (a) when, because of a certain urgency in the matter at issue, particularly in connection with economic treaties, it was highly desirable that certain steps should be taken by agreement in the very near future; and (b) when it was not so much a question of urgency as that the matter was regarded as manifestly highly desirable and almost certain to obtain parliamentary approval.[82]

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[71] See the comments of Israel (ibid., para. 44), France (ibid., para. 45), Switzerland (ibid., para. 46), the United Kingdom of Great Britain and Northern Ireland (ibid., para. 48), Cambodia (ibid., 27th meeting of the Committee of the Whole, para. 4), Romania (ibid., para. 5), Italy (ibid., vol. II, 11th plenary meeting, para. 83) and Poland (ibid., para. 87).

[72] A/CN.4/SR.487, para. 40.

[73] Ibid., para. 41.

[74] *Yearbook of the International Law Commission, 1962*, vol. II, p. 182, para. (1) of the commentary to article 24.

[75] A/CN.4/SR.790, para. 96; see also the example referred to in para. 98.

[76] *Official Records of the United Nations Conference on the Law of Treaties*, vol. I, 26th meeting of the Committee of the Whole, para. 29.

[77] Ibid., 27th meeting of the Committee of the Whole, para. 5.

[78] Ibid., para. 7.

[79] Ibid., vol. II, 11th plenary meeting, para. 59.

[80] Ibid., para. 67.

[81] Ibid., para. 83

[82] Ibid., para. 89.

40. Another reason cited pertained to considerations of domestic law. For example, Sweden noted that provisional application was provided for because there was often no absolute assurance that the outcome of internal constitutional procedures would confirm the provisional acceptance of the treaty.[83] Antonio de Luna had, in 1965, alluded to this when he noted that the method referred to in article 24 was a much more elegant means of overcoming the difficulties raised by constitutional requirements for ratification than the method of using a special terminology so as to avoid the terms "treaty" and "ratification".[84] At the same session, Mr. Bartoš observed that if a treaty was applied only provisionally, most legal systems would regard that situation as a practical expedient which did not introduce the rules of international law into internal law.[85]

41. Several delegations at the Vienna Conference were of the same view. For example, Yugoslavia considered the article to be useful legally.[86] Romania observed that provisional application satisfied the actual requirements of States by setting up machinery through which delays in ratification, approval or acceptance could be avoided.[87] Malaysia noted that it was often expedient to avoid the unnecessary delay entailed by going through the traditional channels.[88]

42. However, a number of delegations expressed doubts precisely for reasons of compliance with domestic law. For example, Viet Nam noted that States might commit themselves hastily under the pressure of circumstances without weighing all the difficulties that the subsequent ratification of their commitments might encounter.[89] Venezuela observed that Governments hesitated to commit themselves without complying with the procedure prescribed by internal law unless they were certain that ratification would not give rise to any political difficulty.[90] Greece stated that the provisions of article 22 could lead to a conflict between international law and the constitutional law of a State and thereby give rise to delicate situations.[91] Several delegations, however, observed that the solution for States facing constitutional difficulties was not to conclude treaties containing clauses permitting their provisional application.[92] The Expert Consultant expressed surprise at the degree of anxiety, since to him the article seemed to offer a protection to the constitutional position of certain States rather than the contrary, because there was no need for the State concerned to resort to the procedure of provisional application at all.[93]

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[83] See A/CN.4/182 and Corr.1 and 2 and Add.1-3.

[84] A/CN.4/SR.790, para. 92.

[85] A/CN.4/SR.791, para. 21. See also the comment of Eduardo Jiménez de Aréchaga that it was because of the constitutional difficulties which sometimes delayed ratification that he considered article 24 particularly useful (ibid., para. 50).

[86] *Official Records of the United Nations Conference on the Law of Treaties*, vol. I, 26th meeting of the Committee of the Whole, para. 28.

[87] Ibid., 27th meeting of the Committee of the Whole, para. 5.

[88] Ibid., para. 7.

[89] Ibid., 26th meeting of the Committee of the Whole, para. 26.

[90] Ibid., para. 30. See also the comments of Switzerland (ibid., para. 46), the United States (ibid., para. 51) and Malaysia (ibid., 27th meeting of the Committee of the Whole, para. 7).

[91] Ibid., vol. II, 11th plenary meeting, para. 73.

[92] See the statements of Uruguay (ibid., para. 78), Canada (ibid., para. 80), Italy (ibid., para. 84), Colombia (ibid., para. 86), Poland (ibid., para. 87) and Uganda (ibid., para. 92).

[93] Ibid., paras. 89 and 90.

43. Guatemala,[94] Costa Rica,[95] Cameroon[96] and Uruguay[97] announced that they could not support the article for reasons of conflict with their respective Constitutions. The Republic of Korea indicated that it had abstained from voting on the provision as that might place its Government in a difficult position because of constitutional considerations.[98] El Salvador indicated that although article 22 raised certain problems for its delegation, it had voted in favour of the article in recognition of the importance of the international practice involved.[99] Following the adoption of the entire Convention on the Law of Treaties, the delegation of Guatemala placed on record its reservations regarding, inter alia, article 25, in the light of limitations imposed by its Constitution.[100]

B. Shift from provisional "entry into force" to provisional "application"

44. The various iterations of the provision developed by the Commission were framed in terms of "entry into force" on a provisional basis. Nonetheless, references to the phrase "provisional application" can be found in the Commission's records as far back as 1962. For example, that year, Alfred Verdross referred to a practice whereby a treaty, once signed, might be put into effect if given practical application even before ratification.[101] Herbert Briggs cited the example of a treaty between the United States and the Philippines of which a provision had been given application by presidential proclamation on a date earlier than that of entry into force.[102] Mr. Bartoš, referring to several agreements between Italy and Yugoslavia, indicated that those agreements had provided for provisional application pending ratification.[103]

45. Mr. Waldock's proposal for article 21, in paragraph 2, subparagraph (b), stated that any of the parties might give notice of the termination of the provisional application of the treaty.[104] He explained that there must come a time when States were entitled to say that the provisional application of the treaty must come to an end,[105] and suggested that it was desirable to make withdrawal from the provisional application of the treaty an orderly process.[106] Mr. Tunkin doubted the advisability of including subparagraph (b) because it might be interpreted in such a manner as to allow a State to terminate the provisional application of a treaty, notwithstanding the provisions of the treaty itself.[107]

46. Article 21 (renumbered 24), adopted by the Commission in 1962, included the following clause: "or the States concerned shall have agreed to terminate the

[94] Ibid., para. 54.
[95] Ibid., para. 67.
[96] Ibid., para. 72.
[97] Ibid., para. 77.
[98] Ibid., para. 102.
[99] Ibid., paras. 103 and 104.
[100] Ibid., 36th plenary meeting, para. 69.
[101] A/CN.4/SR.644, para. 69.
[102] Ibid., para. 87.
[103] A/CN.4/SR.647, para. 98.
[104] See A/CN.4/144 and Add.1.
[105] Ibid., para. (4) of the commentary to article 21.
[106] Ibid.
[107] A/CN.4/SR.657, para. 15.

provisional application of the treaty".[108] The commentary to the article indicated that the "provisional" application of the treaty would terminate upon the treaty being duly ratified or approved or when the States concerned agreed to put an end to the provisional application of the treaty.[109]

47. Some of the written comments submitted by Governments were formulated in terms of provisional "application". For example, Sweden referred to the termination of provisional application of the treaty.[110] The Netherlands considered the difference between provisional entry into force and provisional application, and suggested that the term "provisional application" might also be understood to refer to a non-binding form of provisional application.[111]

48. It was in the context of a comment by Mr. Reuter, in 1965, that the propriety of referring to "provisional application", as opposed to "provisional entry into force", was raised directly. In his view:

> The expression "provisional entry into force" no doubt corresponded to practice, but it was quite incorrect, for entry into force was something entirely different from the application of the rules of a treaty. Entry into force might depend on certain conditions, a specified term or procedure, which dissociated it from the application of the rules of the treaty. The practice to which the article referred was not to bring the whole treaty into force with its conventional machinery, including, in particular, the final clauses, but to make arrangements for the immediate application of the substantive rules contained in the treaty.[112]

49. Support for this view was expressed by Mr. Verdross, who stated that what was involved was obviously the application of some of the provisions of the treaty, not the treaty as a whole, and certainly not the final clauses;[113] the Chair (Mr. Bartoš);[114] Mr. de Luna, who agreed about the inappropriateness of the expression "provisional entry into force";[115] Manfred Lachs, who expressed the view that the provision really related to the application of the clauses of the treaty on a provisional basis;[116] and Mr. Briggs.[117] Eduardo Jiménez de Aréchaga agreed from a logical point of view, but indicated that the practice of provisional entry into force was a common one.[118]

50. Roberto Ago explained his understanding of the situation, saying that

> article 24 dealt with two entirely different situations. The first, to which Mr. Reuter had referred ... was that where the treaty itself did not enter into force until the exchange of the instruments of ratification or approval; it was by a kind of secondary agreement, separate from the treaty, that the parties, at

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[108] *Yearbook of the International Law Commission, 1962*, vol. II, p. 182.

[109] Ibid., para. (2) of the commentary to article 24.

[110] A/CN.4/182 and Corr.1 and 2 and Add.1, comment on article 24; see also the comment by Luxembourg on article 12.

[111] See A/CN.4/182 and Corr.1 and 2 and Add.1-3.

[112] A/CN.4/SR.790, para. 75.

[113] Ibid., para. 81.

[114] Ibid., para. 83.

[115] Ibid., para. 91.

[116] Ibid., para. 100.

[117] A/CN.4/SR.791, para. 3.

[118] A/CN.4/SR.790, para. 76. Mr. Tunkin disagreed with Mr. Reuter's view (see A/CN.4/SR.791, para. 29).

> the time of signing, agreed to apply provisionally certain or even all of the treaty's clauses. The second, and more important, situation was that which the Commission had envisaged in 1962 and which the Special Rapporteur had had in mind when proposing his redraft, the case where the treaty actually entered into force at the time of signature but was subject to subsequent ratification; the ratification did no more than confirm what had existed ever since the time of signature. It might be said that in such a case the treaty entered into force subject to a resolutory condition. If the ratification did not take place within the prescribed time, the treaty would cease to be in force; but it would have been in force and produced its effects from the time of signature up to the time when it ceased to be in force through the absence of ratification.... If ... the entry into force did not take place until the time of ratification, what happened during the interim between signature and ratification was that certain of the treaty's clauses were applied provisionally by virtue of a secondary agreement between the parties, and it was only that agreement which entered into force.[119]

He added later that the first of the situations of which he had spoken, that of the provisional application referred to by Mr. Reuter, should be mentioned in article 24.[120]

51. Senjin Tsuruoka indicated his agreement with Mr. Ago that what happened was that an agreement distinct from the treaty entered into force in conformity with article 23; the treaty was then applied provisionally according to the conditions provided for in that subsidiary agreement.[121] Mr. Jiménez de Aréchaga, however, was not convinced that there was any practical difference between the two situations that Mr. Ago had mentioned.[122] Mr. Tunkin agreed with Mr. Ago that two possibilities existed, but, on practical grounds, he did not consider that both should be covered in article 24. Provisional entry into force was of importance, and article 24 should be retained to deal with it.[123]

52. Mr. Waldock later recalled that some difference of opinion had arisen as to whether, in the case contemplated by the article, the treaty entered into force provisionally or there was an agreement to apply certain provisions of the treaty. The Drafting Committee had framed article 24 in terms of the entry into force provisionally of the treaty because that was the language very often used in treaties and by States. Moreover, it seemed to him that the difference between the two concepts was a doctrinal question.[124] He added that article 23 (Entry into force of treaties) in fact contemplated cases where a treaty did not provide for its entry into force but where, by separate agreement, the States concerned agreed that it should be brought into force by a certain date. He could not see that there was any great difference between such a case and cases where the States concerned agreed that, although it was subject to ratification, the treaty was to come into force provisionally.[125]

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[119] A/CN.4/SR.791, paras. 5-7.
[120] Ibid., para. 17.
[121] Ibid., para. 11.
[122] Ibid., para. 53.
[123] Ibid., para. 54.
[124] A/CN.4/SR.814, para. 39.
[125] Ibid., para. 40.

53. At the Vienna Conference, in 1968, the Committee of the Whole considered a joint proposal submitted by Czechoslovakia and Yugoslavia to amend paragraph 1 of article 22 so as to replace the reference to provisional entry into force by provisional application.[126] Support for the amendment was expressed by the United States (if article 22 was to be retained, the words "be applied" should be substituted for "enter into force"),[127] Ceylon (endorsed the use of the term "be applied"),[128] Italy (confusion should be avoided between mere application, which was a question of practice, and entry into force, which was a formal legal notion),[129] Czechoslovakia (the term used should be "provisional application", because there could hardly be two entries into force),[130] Israel (the word "provisionally" introduced a time element, and unless emphasis was placed on application rather than entry into force, it would be necessary to specify that the word "provisionally" referred to time and not to legal effects),[131] France (the notion of provisional entry into force was difficult to define legally),[132] Switzerland,[133] the United Kingdom (it was the application rather than the entry into force of the treaty that was contemplated),[134] Greece,[135] Cambodia,[136] Thailand[137] and Ecuador (the reference to "provisional application" had a more legal connotation and was more accurate than "entry into force provisionally").[138] Iraq, however, disagreed (from the legal point of view, the situation was the same as when the treaty entered into force. The only difference was in the time factor).[139]

54. The Expert Consultant recalled that the International Law Commission, and especially its Drafting Committee, had discussed at length the choice between the expressions "provisional application" and "entry into force provisionally". The Commission had finally decided to refer to "entry into force provisionally" because it understood that the great majority of treaties dealing with the institution under discussion expressly used that term. From the point of view of juridical elegance, it also seemed preferable not to speak of application, since it was clear that before any treaty provisions could be applied, some international instrument must have come into force. That instrument might be the main treaty itself, or an accessory agreement such as an exchange of notes outside the treaty. Another reason was that it was very common for that institution to be used in cases where there was considerable urgency to put the provisions of the treaty into force. In those cases, ratification sometimes never took place, because the purpose of the treaty was actually

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[126] A/CONF.39/C.1/L.185 and Add.1, reproduced in *Official Records of the United Nations Conference on the Law of Treaties*; vol. III, Report of the Committee of the Whole, para. 224.
[127] Ibid., vol. I, 26th meeting of the Committee of the Whole, para. 24.
[128] Ibid., paras. 34 and 35.
[129] Ibid., para. 43.
[130] Ibid., para. 37.
[131] Ibid., para. 44.
[132] Ibid., para. 45.
[133] Ibid., para. 46.
[134] Ibid., para. 49.
[135] Ibid., para. 54.
[136] Ibid., 27th meeting of the Committee of the Whole, para. 4.
[137] Ibid., para. 8.
[138] Ibid., para. 14.
[139] Ibid., 26th meeting of the Committee of the Whole, para. 52.

completed before it could take place. Clearly such acts must have a legal basis, and for that reason reference should be made to "entry into force provisionally".[140]

55. Nonetheless, the amendment was adopted, and subsequent versions of the article reflected the new formulation. The matter arose again the following year when an exchange of views was held in the plenary of the Conference regarding the legal implications of the change in formulation.[141]

C. Legal basis for provisional application

56. The International Law Commission initially conceived of the practice of provisional entry into force as a possibility afforded only under the terms of the treaty itself. Mr. Lauterpacht, in 1953, provided examples of specific provisions in treaties permitting application prior to entry into force.[142] Mr. Fitzmaurice, in his first report, retained this approach in his proposal for article 42, paragraph 1 ("a treaty may, however, provide that it shall come into force provisionally").[143] Likewise, Mr. Waldock, in his first report, initially also limited it to treaties which expressly provided therefor.[144] The debate in the Commission in 1962 was also framed in such terms. For example, Mr. Bartoš cited examples of international agreements in which it had been stipulated that the treaty should be applied from the day of signature, whereas the treaty's binding force was conditional on the exchange of the instruments of ratification.[145]

57. However, Mr. Rosenne noted that sometimes, where a formal agreement was made subject to ratification, an agreement in simplified form was concluded for the interim period to bring the former provisionally into force until it had been ratified or until it had become clear that it was not going to be ratified.[146] The Special Rapporteur agreed, stating that an explanation was necessary in the commentary to indicate that that eventuality was covered, since the language of article 21 did not specifically cover the point.[147] While article 21 (renumbered 24), adopted by the Commission that year, retained the earlier approach, the commentary included the observation that whether the treaty was to be considered as entering into force provisionally in virtue of the treaty or of a subsidiary agreement concluded between the States concerned in adopting the text might be a question.[148]

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[140] Ibid., 27th meeting of the Committee of the Whole, paras. 15-18.

[141] See the discussion in paras. 77-79 of the present memorandum.

[142] A/CN.4/63, para. 5 (b) of the comment on article 6 (2) (b).

[143] See A/CN.4/101.

[144] A/CN.4/144 and Add.1, articles 20 (6) ("a treaty may prescribe that it shall come into force provisionally") and 21 (2) (a) ("when a treaty lays down that it shall come into full force provisionally").

[145] A/CN.4/SR.647, para. 97. See also the statement of Yuen-li Liang, Secretary of the Commission, referring to a passage in the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements* (ST/LEG/7, para. 42), which provided that a State could not become a party to an agreement on a provisional basis, or with respect to certain of its provisions only, unless such a possibility was provided for in the agreement (ibid., para. 40).

[146] A/CN.4/SR.668, para. 38.

[147] Ibid., para. 39.

[148] *Yearbook of the International Law Commission, 1962*, vol. II, p. 182, para. (1) of the commentary to article 24.

58. In his fourth report, Mr. Waldock, in response to a comment submitted by Sweden in which the possibility of separate agreement between the parties was raised,[149] proposed to revise article 24 in order to take account of cases where the agreement to bring the treaty into force provisionally was not expressed in the treaty itself but concluded outside it.[150] His proposed text read, in fine: "A treaty may prescribe, or the parties may otherwise agree that, pending its entry into force it shall come into force provisionally".[151] The Special Rapporteur explained that the word "otherwise" was intended to cover the case in which there was no provision on the subject in the treaty itself, but the parties made a separate agreement, for example, by an exchange of notes. That agreement would itself constitute a treaty, but would not be the treaty whose provisional entry into force was in question.[152]

59. Different views were expressed on the point in the Commission. For example, while Mr. Rosenne proposed referring only to the agreement of the parties,[153] Mr. Lachs preferred referring to both situations.[154] Mr. El-Erian was of the view that the question of whether provisional entry into force had its source in the treaty itself or in a subsidiary agreement was a doctrinal issue which could be left to interpretation.[155] The Special Rapporteur observed that if no provision was made in the treaty itself, States could not be prevented from bringing the whole or part of the treaty into force by separate agreement.[156]

60. The text eventually adopted by the Commission referred to the provisional entry into force of a treaty in two scenarios: where the treaty itself prescribed, or where the negotiating States had in some other manner so agreed.[157] As regards the latter, the commentary indicated that an alternative procedure having the same effect was for the States concerned, without inserting a clause in the treaty, to enter into an agreement in a separate protocol or exchange of letters, or in some other manner, to bring the treaty into force provisionally.[158]

61. At the Vienna Conference, all the proposals for amendments to paragraph 1 of article 22 retained the two possibilities for bringing about the provisional application of a treaty indicated in the version adopted by the Commission.

D. Provisional application of part of a treaty

62. The early proposals for a provision on provisional entry into force, up until and including that made by Mr. Waldock in his first report, were focused on the entire treaty. Nonetheless, in 1962 the Commission adopted, on first reading, a revised version of the article which referred to the provisional entry into force of a treaty either in whole or in part.[159] In 1965, the article was restructured by the

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149 See A/CN.4/182 and Corr.1 and 2 and Add.1-3.
150 See A/CN.4/177 and Add.1-2.
151 Ibid.
152 A/CN.4/SR.790, para. 90.
153 Ibid., para. 95.
154 Ibid., para. 101.
155 Ibid., para. 97.
156 A/CN.4/SR.814, para. 46.
157 *Yearbook of the International Law Commission, 1966*, vol. II, p. 210, article 22, para. 1.
158 Ibid., para. (2) of the commentary to article 22.
159 *Yearbook of the International Law Commission, 1962*, vol. II, p. 182, article 24.

Drafting Committee by, inter alia, moving the question of provisional entry into force of part of a treaty into a second paragraph, which read, in the form subsequently adopted: "The same rule applies to the entry into force provisionally of part of a treaty". The commentary included the following explanation:

> No less frequent today is the practice of bringing into force provisionally only a certain part of a treaty in order to meet the immediate needs of the situation or to prepare the way for the entry into force of the whole treaty a little later.[160]

63. While two proposals to delete paragraph 2[161] were rejected[162] at the Vienna Conference, a joint proposal by Czechoslovakia and Yugoslavia for paragraph 1[163] was approved,[164] resulting in the content of paragraph 2 of the Commission's version being moved into the chapeau to paragraph 1 ("A treaty or a part of a treaty is applied provisionally").

E. Conditionality

64. During the early consideration in the Commission, references to the provisional entry into force of a treaty typically also alluded to the conditions under which the treaty would enter into force on a provisional basis. Mr. Lauterpacht, in his first report, cited examples of treaties coming into force, prior to ratification, upon a certain date, i.e., the date of signature, or within 15 days therefrom.[165] In his proposal for article 42, paragraph 1, Mr. Fitzmaurice envisaged the provisional entry into force of a treaty taking place on a certain date, or upon the happening of a certain event, such as the deposit of a specified number of ratifications.[166] Similarly, Mr. Waldock included a reference to provisional entry into force taking place "on signature or on a specified date or event", in his proposal for article 20, paragraph 6, as well as "upon a certain date or event", in that for article 21, paragraph 2, subparagraph (a).[167] Article 21 (renumbered 24), adopted in 1962, spoke of provisional entry into force "on a given date or on the fulfilment of specified requirements".[168]

65. However, the text adopted by the Commission in 1965 excluded any reference to a date or event upon which a treaty would enter into force on a provisional basis.

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160 *Yearbook of the International Law Commission, 1966*, vol. II, p. 210, para. (3) of the commentary to article 22.

161 Proposals by the Philippines (see A/CONF.39/C.1/L.165) and jointly by Czechoslovakia and Yugoslavia (see A/CONF.39/C.1/L.185 and Add.1). See also the statements of the Philippines (*Official Records of the United Nations Conference on the Law of Treaties*, vol. I, 26th meeting of the Committee of the Whole, para. 25) and of Malaysia and Thailand (ibid., 27th meeting of the Committee of the Whole, paras. 7 and 8).

162 By 63 votes to 11, with 12 abstentions (ibid., vol. III, Report of the Committee of the Whole, para. 227 (a)).

163 See A/CONF.39/C.1/L.185 and Add.1.

164 By 72 votes to 3, with 11 abstentions (see *Official Records of the United Nations Conference on the Law of Treaties*, vol. III, Report of the Committee of the Whole, para. 227 (b).

165 A/CN.4/63, para. 5 (b) of the comment on article 6 (2) (b).

166 See A/CN.4/101.

167 See A/CN.4/144 and Add.1.

168 *Yearbook of the International Law Commission, 1962*, vol. II, p. 182.

This was maintained in all subsequent versions, including that eventually adopted as article 25 of the Convention.

F. Juridical nature of provisional application

1. Consideration in the context of the provisional application of treaties

66. The general position of the Commission, maintained throughout its consideration of the provisional entry into force of treaties, was that such practice resulted in an obligation to execute the treaty, even if only on a provisional basis.[169]

67. For example, Mr. Fitzmaurice, in his first report, proposed article 42, which, in its paragraph 1, provided that in such cases, an obligation to execute the treaty on a provisional basis would arise.[170] During the debate on the report, in 1959, in response to a query by Mr. Bartoš (who wondered what the juridical status of such agreements would be if one of the parties failed to ratify), the Special Rapporteur recalled that the point was covered in article 42, paragraph 1.[171] Mr. Scelle, however, considered that a treaty which had not been ratified could not be regarded as having been concluded or as having effect.[172]

68. The matter was raised again in 1962, during the consideration of Mr. Waldock's first report, and not only in the context of his proposals on the provisional entry into force of treaties. In the context of draft article 9 (Legal effects of a full signature), specifically as regarding the reference to good faith on the part of a signatory State, in paragraph 2, subparagraph (c), Mr. Verdross indicated that if a treaty was signed subject to ratification and not ratified, no obligation would arise. That would not preclude the practice whereby a treaty, once signed, might be put into effect if given practical application even before ratification; it would then be ratified de facto.[173] The matter was again taken up by Mr. Bartoš, at a later meeting, during the discussion on article 12 (Legal effects of ratification), where he stated that from time to time it happened that the exchange of the instruments of ratification did not take place until some time after the provisions of the treaty, although up to that point only of provisional validity, had been applied in full. Subsequent ratification in such a case gave binding force to the effects of the treaty and to acts based on the treaty.[174]

69. The view of the two Special Rapporteurs who dealt with the question of the provisional entry into force of treaties in their respective reports, Mr. Fitzmaurice and Mr. Waldock, was clear: both chose to deal with the arrangement as a species of the entry into force of treaties, with all the legal consequences that followed. Mr. Waldock was the more explicit on the point.[175] In explaining his proposal for article 20, paragraph 6, he indicated that a clause providing for the provisional entry

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[169] See the statement by Mr. François, in 1951, which, although pertaining more directly to the question of the impact of internal law on the observance of treaties, illustrated the type of legal complexity that could arise in the context of treaties being provisionally applied (A/CN.4/SR.88, paras. 37-38).

[170] See A/CN.4/101.

[171] A/CN.4/SR.487, paras. 37-38.

[172] Ibid., para. 39.

[173] A/CN.4/SR.644, para. 69.

[174] A/CN.4/SR.647, para. 97.

[175] For Mr. Fitzmaurice's view, see para. 67 of the present memorandum.

into force of the treaty was, from one aspect, a clause relating to a mode of bringing a treaty into force.[176] The "legal effects" of provisional entry into force were then outlined in his proposal for article 21, in paragraph 2, subparagraph (a), which provided that the rights and obligations contained in the treaty shall come into operation for the parties to it.[177] He indicated that paragraph 2 sought to formulate the legal effects of the provisional entry into force of a treaty. Clearly, the rule in 2 (a) followed simply from the provisional nature of the entry into force.[178]

70. Notwithstanding the contrary view of at least one member,[179] the Commission retained such contextual reference to "entry into force" in article 22 (renumbered 24), as adopted in 1962.[180] Following on the suggestion by Mr. Bartoš that some explanation was needed in the commentary to forestall the argument that there was something illogical in a treaty being brought into force provisionally and made subject to the exchange of instruments of ratification in order to have binding force,[181] the commentary to article 24 confirmed that there could be no doubt that such clauses had legal effect and brought the treaty into force on a provisional basis.[182]

71. In its written comments on the provision, submitted in 1965, the Netherlands indicated that it interpreted this article as referring only to cases in which States had legally committed themselves to a provisional entry into force. It added, however, that the signatory States might also enter into a non-binding agreement concerning provisional entry into force (within the limits imposed by their respective national laws).[183]

72. In 1965, the Chair (Mr. Bartoš), commenting on article 24, expressed the view that international relations would be made easier if States were given the possibility of putting certain treaties into force provisionally, before ratification, not as a mere practical expedient, but with all the legal consequences of entry into force. He was convinced that the provisional entry into force really conferred validity and a legal obligation; even if the treaty subsequently lapsed owing to lack of ratification, that dissolution of the treaty would not be retroactive and did not prevent the treaty from having been in force during a certain time. There had been a legal position which had produced its effects, and situations had been created under that regime; consequently, the question could not be said to be purely abstract.[184]

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176 A/CN.4/144 and Add.1, para. (7) of the commentary to article 20.

177 Ibid., article 21 (2) (b).

178 Ibid., para. (4) of the commentary to article 21.

179 A/CN.4/SR.657, para. 9 (Mr. Castrén).

180 *Yearbook of the International Law Commission, 1962*, vol. II, p. 182 ("the treaty shall come into force as prescribed and shall continue in force"). See also the view of the Sixth Committee, adopted the following year, in the context of the regulations for the implementation of Article 102 of the Charter of the United Nations ("It was recognized that, for the purposes of article 1 of the regulations, a treaty comes into force when, by agreement, it is applied provisionally by two or more of the parties thereto") (A/CN.4/154, in *Yearbook of the International Law Commission, 1963*, vol. II, p. 29).

181 A/CN.4/SR.668, para. 40.

182 *Yearbook of the International Law Commission, 1962*, vol. II, p. 182, para. (1) of the commentary to article 24.

183 See A/CN.4/182 and Corr.1 and 2 and Add.1-3.

184 A/CN.4/SR.791, para. 24. See also the statement of Mr. Tsuruoka (ibid., para. 27).

73. At the Vienna Conference, the question of the legal nature of the provisional application of a treaty was discussed primarily in the context of the principle of *pacta sunt servanda*.

2. Consideration in the context of the *pacta sunt servanda* principle

74. The juridical nature of the provisional application of treaties was also raised in the context of the Commission's consideration of the principle of *pacta sunt servanda*. The commentary to article 55, adopted in 1964, indicated that it was necessary on logical grounds to include the words "in force". Since the Commission had adopted a number of articles which dealt with the entry into force of treaties, including cases of provisional entry into force, it seemed necessary to specify that it was treaties in force in accordance with the provisions of the present articles to which the *pacta sunt servanda* rule applied.[185]

75. Israel, in its written comments, submitted in 1965, referred to the commentary to article 55, and observed that the question might arise as to the interrelation of this article with article 24 (on provisional entry into force), it being understood, that the general principle of *pacta sunt servanda* would apply to the underlying agreement upon which the provisional entry into force was postulated.[186]

76. In response to the latter observation, Mr. Waldock, in his sixth report, recalled that the Commission had not, either in 1962 or in 1965, sought to specify what precisely was the source of the parties' obligations in cases of provisional entry into force.[187] He continued:

> Article 24, as it now reads, states the law unambiguously in terms of the treaty's entering into force provisionally; in other words, under article 24 the treaty is stated as being brought "into force". Consequently, there does not appear to be any need in the present article to make special reference to "treaties provisionally in force". Under the present article, the *pacta sunt servanda* rule is expressed to apply to every "treaty in force" ... treaties may be in force under article 24 as well as under article 23....[188]

The commentary to article 23 (formerly article 55), adopted in 1966, confirmed that the words "in force" covered treaties in force provisionally under article 22.[189]

77. At the Vienna Conference, during the discussion on article 23 in 1968, an exchange of views was held as to whether the shift from "provisional entry into force" to "provisional application", in article 22, had modified the juridical nature of that provision. On the one hand, the United Kingdom indicated its understanding that the rule in article 23 continued to apply equally to a treaty which was being applied provisionally under article 22, notwithstanding the minor drafting changes.[190] India disagreed, taking the view that any obligations that might arise

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185 *Yearbook of the International Law Commission, 1964*, vol. II, p. 177, para. (3) of the commentary to article 55.

186 See A/CN.4/182 and Corr.1 and 2 and Add.1-3.

187 See A/CN.4/186 and Add.1-7.

188 Ibid.

189 *Yearbook of the International Law Commission, 1966*, vol. II, p. 211, para. (3) of the commentary to article 23.

190 *Official Records of the United Nations Conference on the Law of Treaties*, vol. II, 11th plenary meeting, para. 58.

under article 22 would come under the heading of the general obligation of good faith on the basis of article 15 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force) rather than of article 23 (*Pacta sunt servanda*).[191]

78. Norway advised caution so as to avoid the conclusion that the rule in article 23 did not apply to a treaty which was being provisionally applied.[192] In its view, it was clear that under customary international law the *pacta sunt servanda* principle also applied to a treaty during a period of provisional application.[193] Colombia agreed, proposing that the words "or being applied provisionally" be inserted after the words "in force", in article 23.[194] Yugoslavia also proposed a similar amendment to article 23 with a view to ensuring that the wording of the article should cover treaties applied provisionally, the subject of article 22.[195] Romania expressed the view that it was obvious that the principle of *pacta sunt servanda* was just as applicable to treaties which were in force provisionally.[196]

79. The President of the Conference, Mr. Ago, subsequently noted that no one had doubted the soundness of the Yugoslav and Colombian amendments. He then stated that it was obvious that the expression "treaty in force" also covered treaties applied provisionally.[197] The Yugoslav amendment was referred to the Drafting Committee and was considered together with a further Yugoslav proposal, for the inclusion of an article 23 bis, which would have read as follows: "Every treaty applied provisionally in whole or in part is binding on the contracting States and must be performed in good faith".[198] The Chair of the Drafting Committee later indicated that it had considered the Yugoslav proposal to be self-evident and that provisional application also fell within the scope of article 23 on the *pacta sunt servanda* rule.[199]

3. Consideration in the context of the obligation not to frustrate the object of the treaty or to impair its eventual performance

80. Treaties being applied on a provisional basis were also referred to in the course of the discussion on the good faith obligation to refrain from the frustration of the object of the treaty or to impair its eventual performance. In his first report, issued in 1962, Mr. Waldock proposed article 9, entitled "Legal effects of a full signature", which, in its paragraph 2, subparagraph (c), provided: "The signatory State, during the period before it shall have notified to the other States concerned its decision in regard to the ratification or acceptance of the treaty or, failing any such notification, during a reasonable period, shall be under an obligation in good faith to refrain from any action calculated to frustrate the objects of the treaty or to impair its eventual performance".[200]

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[191] Ibid., para. 70.

[192] Ibid., vol. II, 12th plenary meeting, para. 32. See also ibid., vol. I, 29th meeting of the Committee of the Whole, para. 58.

[193] Ibid., vol. II, 12th plenary meeting, paras. 33 and 34.

[194] Ibid., para. 45.

[195] Ibid., para. 50. See also the views of Nepal (ibid., para. 56) and the Ukrainian Soviet Socialist Republic (ibid., para. 61).

[196] Ibid., para. 58.

[197] Ibid., para. 63.

[198] See A/CONF.39/L.24.

[199] *Official Records of the United Nations Conference on the Law of Treaties*, vol. II, 28th plenary meeting, para. 47. See also the statement by Poland (ibid., 29th plenary meeting, paras. 2 and 3).

[200] See A/CN.4/144 and Add.1.

81. During the debate on article 9 that year, Mr. Bartoš welcomed the "good faith" clause in subparagraph 2 (c), in view of the recent growth of a practice, particularly in the case of customs agreements, whereby they entered into force at once pending definitive ratification.[201] Mr. Briggs noted that certain provisions of certain treaties might enter into force on signature.[202] He proposed to include a provision to the effect that, pending the entry into force of a treaty, the obligation not to frustrate the objects of the treaty would be not merely one of good faith, but one which derived from a rule of general international law.[203] Furthermore, Mr. Verdross took the view that paragraph 2, subparagraph (e) ("The signatory State shall also be entitled to exercise any other rights specifically conferred by the treaty itself or by the present articles upon a signatory State") did not preclude the practice whereby a treaty, once signed, might be put into effect if given practical application even before ratification.[204]

82. In response to the debate, the Special Rapporteur, after proposing to move subparagraph (d) into a separate article on the rights and obligations of States pending the entry into force of a treaty in the preparation of which they had participated,[205] added that during the discussion, some members had suggested that the provisions of subparagraph (e) could be useful to cover the question of provisional entry into force. He agreed that that was so.[206] The Drafting Committee later proposed a new article (subsequently renumbered as article 17) which was restricted to the general good faith obligation to refrain from acts calculated to frustrate the objects of the treaty.

83. In 1965, Mr. Briggs noted that article 24 (Provisional entry into force) was different from article 17, which set out certain obligations that good faith imposed, pending the entry into force of the treaty, on States which had participated in the preparation of its text. In the case envisaged in article 24, on the other hand, the participants had prescribed that certain parts of the treaty would apply pending the exchange of ratifications.[207]

84. Article 17 was later adopted as article 15 (Obligation of a State not to frustrate the object of a treaty prior to its entry into force). The provisional application of treaties was not raised during the consideration of article 15 at the Vienna Conference.

G. Termination of provisional application

85. The question of the termination of provisional entry into force featured in the earlier proposals in the International Law Commission. However, it was, for the most part, excluded from article 22 of the 1966 draft articles on the law of

201 A/CN.4/SR.643, para. 86.
202 A/CN.4/SR.644, para. 87.
203 Ibid., para. 88.
204 Ibid., para. 69.
205 A/CN.4/SR.645, para. 17.
206 Ibid., para. 18.
207 A/CN.4/SR.791, para. 2.

treaties,[208] only to be reinserted, into what became article 25, at the Vienna Conference, at the behest of Governments.

86. It is worth recalling that paragraph 2 of article 25 indicates only one method of the termination of provisional application, i.e., through notification by the State wishing to terminate. Other processes or grounds may be expressly provided for by the treaty itself or by separate agreement between the negotiating States. The negotiating history of the provision reveals that other possibilities for the termination of provisional application were considered.

1. Termination upon entry into force of the treaty being provisionally applied

87. Article 20 paragraph 6, as proposed by Mr. Waldock in his first report, provided that a treaty may enter into force provisionally pending its full entry into force.[209] Likewise, subparagraph (a) of article 21, paragraph (2), referred to the provisional entry into force of a treaty until the treaty enters into full force in accordance with its terms.[210] This assertion was presented as a matter of logic, arising from the provisional nature of the entry into force.[211]

88. The Special Rapporteur's proposal was reflected in the text of article 22 (renumbered 24), adopted in 1962, which, in its second sentence provided for, inter alia, the continuation in force of a treaty on a provisional basis "until ... the treaty shall have entered into force definitively".[212] The commentary to article 24 indicated that the "provisional" application of the treaty would terminate upon the treaty being duly ratified or approved in accordance with the terms of the treaty.[213]

89. This understanding was retained in all subsequent versions of the provision, as adopted by the Commission. It even survived the decision, taken in 1965, to delete the clause on the termination of the provisional entry into force of a treaty.[214] The article eventually adopted by the Commission retained the idea, in paragraph 1 (a), that provisional entry into force was to be undertaken pending ratification, acceptance, approval or accession by the contracting States.[215]

90. At the Vienna Conference, a proposal was made by Hungary and Poland to, inter alia, include a more direct reference to provisional application being terminated when the treaty entered into force, in a new paragraph on termination

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[208] Up until 1965, the various versions of the draft article, including that adopted in 1962, made specific reference to the termination of provisional entry into force. In 1965, at the suggestion of the Special Rapporteur, who had come to the conclusion that it was somewhat inconsistent that article 24 should be the only article in part I which dealt with termination, the Drafting Committee decided that article 24 should deal only with the case of a treaty's entry into force provisionally (see A/CN.4/SR.814, para. 44). See also A/CN.4/SR.791, para. 57, and the views of Mr. Ago (A/CN.4/SR.814, para. 49). This position was reiterated in para. (4) of the commentary to article 22 of the articles on the law of treaties, of 1966 (see *Yearbook of the International Law Commission, 1966*, vol. II, p. 210).

[209] A/CN.4/144 and Add.1.

[210] Ibid.

[211] Ibid., para. (4) of the commentary to article 21.

[212] *Yearbook of the International Law Commission, 1962*, vol. II, p. 182.

[213] Ibid., para. (2) of the commentary to article 24.

[214] See note 208.

[215] *Yearbook of the International Law Commission, 1965*, vol. II, p. 162.

(together with the other grounds for termination).[216] The text which subsequently emerged from the Drafting Committee (and which was later adopted as article 25 of the Convention), however, maintained the Commission's approach of referring to the termination of provisional application upon the entry into force of the treaty in paragraph 1, as opposed to paragraph 2, on the termination of provisional application. During the debate on article 22, held in the plenary of the Conference, in 1969, the Expert Consultant observed that it was implied in the notion of provisional application that such application was provisional pending definitive entry into force.[217]

2. Unilateral termination versus termination by agreement

91. Mr. Waldock's proposal for subparagraph (b) of article 21 (2), submitted in 1962, included the possibility of unilateral termination through the giving of notice ("any of the parties may give notice of the termination of the provisional application of the treaty"), the legal effect of which was tied to the elapse of a period of six months (from the giving of the notice).[218] Upon the conclusion of the notice period, the rights and obligations contained in the treaty would cease to apply with respect to that party.[219] In his commentary to the article, he characterized such unilateral termination as a form of withdrawal, and indicated that it seemed desirable to try to give a little more definition to the rule, and perhaps to make withdrawal from the provisional application of the treaty an orderly process.[220] He also hinted at the possibility that this mode of the termination of provisional entry into force might not affect the position of other States for which the treaty had entered into force provisionally, by stating that the draft also suggested that withdrawal would affect only the particular party concerned.[221] However, the text adopted by the Commission in 1962[222] did not include reference to a notice requirement. Instead, the element of initiative, on the part of one or all States, was restricted entirely to mutual agreement.

92. The possibility of termination through notice in subparagraph (b) of article 21 (2) was subject to the general proviso "unless the parties have concluded a further agreement to continue the treaty in force on a provisional basis".[223] Although subparagraph (b) was not referred to the Drafting Committee (for other reasons), the notion of the termination of provisional entry into force by agreement between the parties survived in the text for article 22 (renumbered 24), adopted by the Commission in 1962.[224] In that version, agreement of the parties was presented as one of two modes of termination (the other being automatic termination upon the entry into force of the treaty): "the treaty … shall continue in force on a provisional

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[216] A/CONF.39/C.1/L.198, reproduced in *Official Records of the United Nations Conference on the Law of Treaties*, vol. III, Report of the Committee of the Whole, para. 224.

[217] Ibid., vol. II, 11th plenary meeting, para. 63.

[218] A/CN.4/144 and Add.1, article 21 (2) (b).

[219] Ibid.

[220] Ibid., para. (4) of the commentary to article 21.

[221] Ibid. He, however, qualified the suggestion by stating that this might be a matter for further examination.

[222] *Yearbook of the International Law Commission, 1962*, vol. II, p. 182.

[223] A/CN.4/144 and Add.1, article 21 (2) (b).

[224] *Yearbook of the International Law Commission, 1962*, vol. II, p. 182.

basis until … the States concerned shall have agreed to terminate the provisional application of the treaty".[225]

93. This was criticized by the Netherlands, in a written comment in which it maintained that a Government should also be entitled to terminate a provisional entry into force unilaterally if it had decided not to ratify a treaty that had been rejected by Parliament or if it had decided for other similar reasons not to ratify it.[226]

94. In 1965, José Maria Ruda stated his view that from the point of view of legal theory, so long as definitive consent had not been given, each of the parties should remain free to withdraw from the treaty and, consequently, to terminate its provisional application.[227] Mr. Lachs went further, suggesting that the right of initiative arose in cases in which the ratification of a treaty had been delayed.[228] Mr. Tsuruoka expressed support for the position that the provisional entry into force of the treaty would be presumed to terminate when one of the parties had given notice that it would not ratify the treaty.[229] However, the matter was overtaken by the decision of the Commission to no longer include a specific provision on the termination of provisional entry into force.[230]

95. Belgium, in its written comments submitted in 1967, referred back to the text adopted by the Commission in 1962 and objected to the linking of the termination of provisional entry into force to mutual agreement. It maintained that this stance meant that it would have been impossible for a State to relinquish the obligation to apply the treaty provisionally unless the other contracting States agreed, adding that it would be advisable to provide a means by which the provisional application of a treaty not yet ratified could be terminated unilaterally.[231] During the debate on the law of treaties held in the Sixth Committee at the twenty-second session of the General Assembly, in 1967, Sweden agreed with the Belgian comment, expressing the view that there might be a need to allow States the freedom to terminate such treaties unilaterally without prior notice.[232]

96. At the first session of the Vienna Conference, in 1968, two proposals were made to include of a new paragraph reintroducing the question of the termination of provisional application. Under the proposal submitted by Belgium, a State wishing to terminate the provisional entry into force of a treaty could do so by manifesting its intention not to become a party to the treaty, subject to the proviso "unless otherwise provided or agreed".[233] Hungary and Poland submitted a joint proposal for a new paragraph which recognized notification by one of such States of its

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225 Ibid.

226 See A/CN.4/182 and Corr.1 and 2 and Add.1-3.

227 A/CN.4/SR.790, para. 87.

228 Ibid., para. 103.

229 A/CN.4/SR.791, para. 12. Support for a notification requirement was also indicated by Mr. Tunkin (ibid., para. 30), Mr. Rosenne (ibid., para. 32), Mr. Jiménez de Aréchaga (ibid., para. 51) and Mr. Ago (A/CN.4/SR.814, para. 49).

230 See note 208.

231 A/6827, p. 6.

232 *Official Records of the General Assembly, Twenty-second Session*, Sixth Committee (Legal Questions), 980th meeting, para. 13.

233 A/CONF.39/C.1/L.194, reproduced in *Official Records of the United Nations Conference on the Law of Treaties*, vol. III, Report of the Committee of the Whole, para. 224.

intention not to become a party to the treaty with respect to that State as among the possible grounds for the termination of provisional application.[234]

97. During the debate in 1968, the United States supported the idea of permitting the termination of provisional application either by mutual agreement or upon unilateral notification, and made a proposal of its own.[235] Belgium, referring to its proposed amendment, explained that there was no question of applying the provisions of the draft relating to denunciation of treaties, because a State could not denounce a treaty to which it was not yet party.[236] Italy,[237] France,[238] Switzerland,[239] the United Kingdom[240] and Australia[241] approved of the Belgian amendment.

98. The Committee of the Whole later decided to reinsert a paragraph on termination, based on the Belgian and Polish-Hungarian amendments. The text for article 22, subsequently proposed by the Drafting Committee, contained a new paragraph 2 which established the primary mode of termination of provisional application as being on the basis of unilateral notification, subject to a general proviso as to mutual agreement, reflected in either the treaty or in a subsequent agreement.[242]

99. The new paragraph on the termination of provisional application was scrutinized during the debate on article 22, held in the plenary of the Conference, in 1969. Iran maintained that it allowed the possibility of withdrawal by a State which had already signed a treaty and would seem to undermine the *pacta sunt servanda* rule.[243] In response to a comment by the President of the Conference, pointing to the difficulties in understanding the phrase "unless the treaty otherwise provides",[244] the Chair of the Drafting Committee recalled the decision of the Committee of the Whole to include a paragraph on termination, and clarified that a State which had accepted the provisional application of a treaty could decide later that it did not wish to become a party; upon the other States concerned being notified of that intention, provisional application would cease.[245]

100. Several delegations, including Iran,[246] remained unconvinced. Greece noted that paragraph 2 could give rise to insecurity because in parliamentary systems it was possible for a Government to change its mind and to express a different intention at a later stage.[247] Italy queried as to the legal effect of the termination of provisional application (whether *ex tunc* or *ex nunc*).[248] Poland made a late proposal, which was not adopted, to establish a six-month period before the termination of provisional

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234 A/CONF.39/C.1/L.198, ibid.

235 *Official Records of the United Nations Conference on the Law of Treaties*, vol. I, 26th meeting of the Committee of the Whole, para. 24.

236 Ibid., para. 42.

237 Ibid., para. 43.

238 Ibid., para. 45.

239 Ibid., para. 47.

240 Ibid., para. 49.

241 Ibid., 27th meeting of the Committee of the Whole, para. 10.

242 Ibid., vol. III, Report of the Committee of the Whole, para. 230.

243 Ibid., vol. II, 11th plenary meeting, para. 62.

244 Ibid., para. 65.

245 Ibid., para. 66.

246 Ibid., para. 71.

247 Ibid., para. 75.

248 Ibid., para. 84.

application could take effect.[249] The Conference subsequently adopted article 22 (later renumbered 25), including paragraph 2, without further amendment.

3. Termination as a consequence of unreasonable delay or reduced probability of ratification

101. Mr. Fitzmaurice's proposal for article 42, made in 1956, included the following reference in paragraph 1: "an obligation to execute the treaty on a provisional basis ... will come to an end if final entry into force is unreasonably delayed or clearly ceases to be probable".[250] Unreasonable delay, leading to the perception of the reduced likelihood of ratification, as a ground for termination of provisional entry into force was referred to on several subsequent occasions. For example, Mr. Scelle, during the debate in 1959 on another provision, expressed the view that the days when States could disavow the signatures of their plenipotentiaries had passed; those plenipotentiaries were no longer mere authorized agents. They now had special powers which committed the State to some extent, and the authorities competent to ratify the instrument were no longer free to act arbitrarily. If, acting through simple caprice or with ill intent, they delayed entry into force, a certain State responsibility was entailed. That observation applied to some extent to the special case of treaties that entered into force provisionally.[251]

102. Mr. Waldock, in his proposal for article 21 (2), subparagraph (b), submitted in 1962, cited the circumstance in which the entry into full force of the treaty was unreasonably delayed as the ground for any of the parties to give notice of termination.[252] He explained that he had made the proposal, which was put forward *de lege ferenda*, because it seemed evident that if the necessary ratifications or acceptances, etc., were unreasonably delayed so that the provisional period was unduly prolonged, there had to come a time when States were entitled to say that the provisional application of the treaty had to come to an end.[253]

103. The suggested link to "unreasonable delay" did not, however, find favour with the Commission as a whole. Erik Castrén considered the expression to be far from clear.[254] Mr. Jiménez de Aréchaga doubted the advisability of the rule proposed *de lege ferenda* in paragraph 2 (b); it could have the effect of upsetting certain established treaty relations, and seemed more relevant to the termination of treaties than to the legal effects of entry into force.[255] Mr. Tunkin also expressed doubts, noting that it might be interpreted in such a manner as to allow a State to terminate the provisional application of a treaty, notwithstanding the provisions of the treaty itself, on the ground that, in that State's own view, there had been unreasonable delay in the entry into full force of the treaty.[256] The Special Rapporteur subsequently indicated his willingness to drop subparagraph (b), and observed that it sometimes occurred that a treaty remained in force provisionally throughout its life,

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[249] Ibid., para. 88.

[250] See A/CN.4/101. In his commentary to the provision, the Special Rapporteur simply noted that it "states the rule applicable in case [provisional entry into force] becomes unduly prolonged" (ibid., para. 106).

[251] A/CN.4/SR.488, para. 2.

[252] A/CN.4/144 and Add.1, article 21 (2) (b).

[253] Ibid., para. (4) of the commentary to article 21.

[254] A/CN.4/SR.657, para. 11.

[255] Ibid., para. 14.

[256] Ibid., para. 15.

the device of provisional entry into force being used merely because there was no expectation of parliamentary approval for ratification within due time. In those cases, the treaty never entered formally into full force, because the objects of the treaty were achieved without the "provisional" character of the entry into force ever being terminated.[257]

104. Following the demise of subparagraph (b), the link between the termination of provisional entry into force and undue delay did not feature in any of the subsequent iterations of the provision up to, and including, article 25 of the Convention on the Law of Treaties.

105. Nonetheless, the element of delay, and resultant reduced probability of ratification, was retained in the commentary to article 24, adopted in 1962, which stated, inter alia: "Clearly, the 'provisional' application of the treaty will terminate … upon it becoming clear that the treaty is not going to be ratified or approved by one of the parties. It may sometimes happen that the event is delayed".[258]

106. There was an attempt in 1965 to revive the element of reduced probability of ratification. Sweden, in a written comment, recalled the passage in the commentary to article 24 and expressed the view that it came closest to the legal position underlying the prevailing practice.[259] The Special Rapporteur concurred with the Swedish comment and, in his fourth report, submitted in 1965, proposed to include a new reference to the treaty continuing in force provisionally, inter alia, until "it shall have become clear that one of the parties will not ratify or, as the case may be, approve it".[260]

107. That year, Mr. Jiménez de Aréchaga, while agreeing with the Special Rapporteur's new clause, observed that the formulation was more suited to bilateral treaties; a multilateral treaty would not necessarily lapse for the other parties concerned.[261] Mr. Castrén was of the view that the new language brought the provision closer to unilateral termination, which he thought went too far.[262] Mr. Lachs pointed out that in some cases the position as to ratification or non-ratification by a State would never become clear and that there were many cases in which treaties had remained for years on the agenda of the legislative bodies empowered to ratify them, without any action being taken.[263] He also suggested that the point could be covered by specifying that a State must clarify its position within a certain period of time.[264] Mr. Tunkin, in expressing misgivings about the Special Rapporteur's new formulation, stated that the matter could not be left to a mere inference.[265] The issue was overtaken by the Commission's decision not to include a specific reference to the termination of provisional entry into force.[266]

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257 Ibid., para. 17.

258 *Yearbook of the International Law Commission, 1962*, vol. II, p. 182, para. (2) of the commentary to article 24.

259 See A/CN.4/182 and Corr.1 and 2 and Add.1-3.

260 See A/CN.4/177 and Add.1-2.

261 A/CN.4/SR.790, para. 77.

262 Ibid., para. 80.

263 Ibid., para. 102. See also the views of Mr. Ago (A/CN.4/SR.791, para. 8).

264 A/CN.4/SR.790, para. 102.

265 A/CN.4/SR.791, para. 30.

266 See note 208.

108. At the Vienna Conference, in 1968, Ceylon observed that attention should also be given to limiting the period of provisional application. After a specified date, provisional application would cease until ratification.[267] In 1969, Austria proposed the inclusion of a new paragraph providing that the provisional application of a treaty did not release a State from its obligation to take a position within an adequate time limit regarding its final acceptance of the treaty.[268] India expressed the view that it would probably be desirable to lay down some time limit for States to express their intention in the matter, so that the provisional application of a treaty might not be perpetuated.[269] However, such proposals were not accepted, and the Conference subsequently adopted the article without reference to the effect of delay.[270]

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[267] *Official Records of the United Nations Conference on the Law of Treaties*, vol. I, 26th meeting of the Committee of the Whole, para. 32.

[268] Ibid., vol. II, 11th plenary meeting, para. 61.

[269] Ibid., para. 70.

[270] Following the adoption of the article, the Drafting Committee decided not to accept any of the suggestions made during the debate (ibid., 28th plenary meeting, paras. 45-47).